United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 09-231**
	)	**Issued: May 15, 2009**
GOVERNMENT SERVICES ADMINISTRATION, NATIONAL CAPITAL REGION, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 6, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 15, 2008 reducing his compensation. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective September 15, 2008 based on its determination that the constructed position of dispatcher represented his wage-earning capacity.

FACTUAL HISTORY

On November 21, 2005 appellant, a 52-year-old elevator inspector, sustained injury to his left shoulder and lower back when he slipped and fell while climbing stairs. His claim was accepted for left shoulder sprain/strain and left shoulder rotator cuff tear/sprain. On March 16,

2006 appellant underwent authorized surgery to repair a torn left rotator cuff. He stopped work on the date of injury and received medical and wage-loss compensation.

Appellant was treated by Dr. Stephen Webber, a Board-certified orthopedic surgeon. On August 9, 2006 Dr. Webber noted appellant's complaints of severe pain in his neck, shoulder and back. He stated that appellant's pain was much greater than he would expect five months' status post rotator cuff tendon repair. Dr. Webber opined that it was unlikely that appellant would return to work effectively as an elevator inspector.

The Office referred appellant to Dr. H.S. Pabla, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to the nature and extent of his injury-related disability. In an October 19, 2006 report, Dr. Pabla related the history of injury and treatment and provided examination findings. In the left shoulder, he found no obvious asymmetry or wasting of deltoid and parascapular muscles. There was tenderness in the left subacromial region. Range of motion testing revealed: forward flexion -- 90 degrees; abduction -- 100 degrees; passive abduction -- 130 degrees; hyperextension -- 50 degrees; and adduction -- 50 degrees. Arm measurements showed no signs of atrophy and sensory examination was normal. Examination of the lumbar spine revealed no gross postural deformity, kyphosis, scoliosis or pelvic list. Range of motion testing revealed: flexion -- 50 degrees; expansion -- 10 degrees; and lateral flexion -- 15 degrees, both right and left. Straight leg raising was 60 degrees, both right and left. Neurological examination reflected no weakness of the exterior hallus longus or anterior and posterior tibials. Dr. Pabla stated that appellant had ongoing residuals of rotator cuff repair, with mild adhesive capsulitis. He indicated that his left upper extremity range of motion was functional. Dr. Pabla opined that appellant had reached maximum medical improvement and that he could work modified duty with permanent restrictions, which included no overhead work, no lifting more than 30 pounds and no climbing.

On January 17, 2007 appellant was referred for vocational rehabilitation to develop a vocational rehabilitation plan to assist him in obtaining medically suitable employment. Anthony Abumere was assigned to be his vocational rehabilitation counselor.

In a July 3, 2207 report, Dr. Webber opined that appellant had reached maximum medical improvement regarding his shoulder condition. He also opined that appellant was unable to return to his job as an elevator repairman, but could return to work with the following restrictions: no repetitive lifting over 25 pounds; no repetitive overhead lifting; no reaching above shoulder level for more than one hour; restricted repetitive wrist and elbow motion; and limited pushing, pulling and lifting.

On October 11, 2007 appellant signed an Individual Rehabilitation Placement Plan and Job Search Plan and agreement, whereby he agreed to participate in a full-time job search. The stated purpose of the plan was to assist appellant in obtaining the position of dispatcher.[1] Dispatcher position Dictionary of Occupational Titles (DOT) #239.367-014 required an employee to schedule and dispatch workers, equipment or service vehicles. The position was described as sedentary, which was defined as "lifting 10 pounds occasionally." Duties included

[1] The vocational rehabilitation counselor also identified the positions of driver, electronic technician and electrical technician as possible opportunities within appellant's medical restrictions.

using a radio, telephone or computer; relaying workers; receiving or preparing work orders; and monitoring personnel and/or equipment. The vocational counselor opined that, based upon medically determinable residuals of his accepted injury and taking into consideration all significant preexisting conditions and pertinent nonmedical factors, appellant was able to perform the duties of dispatcher. He further indicated that the position was reasonably available in appellant's commuting area.

On May 12, 2008 the Office informed appellant that he would receive 90 days of assistance to assist him in obtaining a position as a dispatcher. Appellant was advised that at the end of the 90-day period, his compensation would be reduced based on the wage-earning capacity of $30,610.00 per year. The record contains reports from the counselor indicating that appellant cooperated fully in the job search and attended a series of interviews for the position of dispatcher. However, the job search did not result in an offer of employment.

On August 13, 2008 the Office issued a notice of proposed reduction of compensation, on the grounds that appellant was no longer totally disabled and had the capacity to earn the wages of a dispatcher at the rate of $588.65 per week. The rehabilitation counselor concluded that, based upon his experience, education, medical restrictions and a labor market survey, appellant was qualified for the position, that sufficient positions were reasonably available in his commuting area and that the duties of the position were within the restriction provided by Dr. Pabla on October 19, 2006. The Office found that the position of dispatcher was medically and vocationally suitable and fairly and reasonably represented his wage-earning capacity. It determined that appellant's compensation would be reduced to $2,557.00 every four weeks. The Office indicated that his salary on November 17, 2005, the date of his injury, was $1,330.25 per week; that the current adjusted pay rate for his job on the date of injury was $1,475.75 per week; and that he was currently capable of earning $588.65 per week, the pay rate of a dispatcher. It determined that he had a 40 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $532.10 per week. The Office then determined that appellant had a loss of wage-earning capacity (LWEC) of $798.15 per week. It concluded that, based upon a 75 percent rate, appellant's new compensation rate was $598.64 per week, increased by the cost of living to $639.25 per week. A copy of the August 13, 2008 proposed reduction was sent to appellant and he was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

Appellant submitted an undated hand-written note in which he stated that there had always been a "50-50" chance that his rotator cuff repair would not "work." He also submitted a March 16, 2006 operative report and a March 5, 1974 position description for an administrative assistant.

By decision dated September 15, 2008, the Office finalized the reduction of appellant's compensation benefits effective that date, in accordance with the August 13, 2008 proposed notice of proposed reduction of compensation. It found that he was physically and vocationally capable of earning the wages of a dispatcher and the position was reasonably available in his commuting area.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[2] Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[3]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,[4] will result in the percentage of the employee's LWEC.[5]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[6] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[7]

ANALYSIS

The Office determined that the selected position of dispatcher represented appellant's wage-earning capacity as of September 15, 2008, based upon Dr. Pabla's October 19, 2006 report. It found that the physical requirements of the dispatcher position did not exceed the restrictions provided by Dr. Pabla. The Board finds that the Office properly reduced appellant's compensation based on his ability to perform the duties of a dispatcher.

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[2] *David W. Green*, 43 ECAB 883 (1992).

[3] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[4] 5 ECAB 376 (1953).

[5] *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

[6] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[7] *John D. Jackson*, 55 ECAB 465 (2004); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

In an October 19, 2006 second opinion report, Dr. Pabla opined that appellant was able to work full time with restrictions. He related the history of injury and treatment and provided detailed examination findings. Dr. Pabla found no obvious asymmetry or wasting of deltoid and parascapular muscles in the left shoulder. Based upon his findings, he found that appellant's left upper extremity range of motion was functional. Arm measurements showed no signs of atrophy and sensory examination was normal. Examination of the lumbar spine revealed no gross postural deformity, kyphosis, scoliosis or pelvic list. Straight leg raising was 60 degrees, both right and left. Neurological examination reflected no weakness of the exterior hallus longus or anterior and posterior tibials. Dr. Pabla stated that appellant was suffering from ongoing residuals of rotator cuff repair, with mild adhesive capsulitis. He opined that appellant had reached maximum medical improvement and that he could work modified duty with permanent restrictions, which included no overhead work, no lifting more than 30 pounds and no climbing.

On July 3, 2007 appellant's treating physician, Dr. Webber, also opined that appellant had reached maximum medical improvement regarding his shoulder condition and that he could return to full-time employment with restrictions. He recommended against repetitive lifting over 25 pounds; overhead lifting; reaching above shoulder level for more than one hour; excessive repetitive wrist and elbow motion; and excessive pushing, pulling and lifting.

Dispatcher position DOT #239.367-014, which the Office determined was suitable for appellant, required an employee to schedule and dispatch workers, equipment or service vehicles. The position was described as sedentary, which was defined as "lifting 10 pounds occasionally." Duties included using a radio, telephone or computer; relaying workers; receiving or preparing work orders; monitoring personnel and/or equipment. The Board finds that the physical requirements of the dispatcher position do not exceed the recommended restrictions of either appellant's treating physician or the Office's second opinion physician. Rather, the sedentary position of dispatcher is within appellant's restrictions, as delineated by both Dr. Webber and Dr. Pabla.

Appellant contends that he continues to have residuals from his accepted condition and that his rotator cuff repair was unsuccessful. However, his subjective complaints do not constitute medical evidence of his inability to perform the duties of the sedentary dispatcher position. Both Dr. Webber and Dr. Pabla recognized that appellant had continuing shoulder pain resulting from the accepted injury. Consequently, they recommended work restrictions to accommodate his residuals.

There is no dispute that the position of dispatcher is vocationally suitable for appellant. The vocational rehabilitation counselor determined that appellant was able to perform the duties of the position and that the position was available in sufficient numbers so as to make it reasonably available within his commuting area. The counselor advised that appellant's prior work experience and educational background qualified him for the position.

The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the dispatcher position represented his wage-earning capacity.[8] The weight of

[8] *Loni J. Cleveland*, 52 ECAB 171 (2000).

the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of dispatcher as of September 15, 2008 and that such a position was reasonably available within the general labor market of his commuting area.

The Board also finds that the Office properly determined appellant's LWEC in accordance with the formula developed in *Albert C. Shadrick*[9] and codified at section 10.403 of the Office's regulations.[10] In this regard, the Office indicated that his salary on November 17, 2005, the date of his injury, was $1,330.25 per week; that the current adjusted pay rate for his job on the date of injury was $1,475.75 per week; and that he was currently capable of earning $588.65 per week, the pay rate of a dispatcher. It then determined that appellant had a 40 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $532.10 per week. The Office then determined that appellant had a LWEC of $798.15 per week. It concluded that, based upon a 75 percent rate, appellant's new compensation rate was $598.64 per week, increased by the cost of living to $639.25 per week and that his net compensation for each four-week period would be $2,557.00. The Board finds that the Office correctly applied the *Shadrick* formula and, therefore, properly found that the position of dispatcher reflected appellant's wage-earning capacity effective September 15, 2008.[11]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective September 15, 2008, based on its determination that the constructed position of dispatcher represented his wage-earning capacity.

[9] *Supra* note 4.

[10] 20 C.F.R. § 10.403.

[11] *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2008 decision of the Office of Workers' Compensation Programs reducing appellant's compensation benefits is affirmed.

Issued: May 15, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board